STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: MOHAMMAD AFZAL, Petitioner, To Review Under Section 101 of the Labor Law: An Order to Comply with Article 19 of the Labor Law, and An Order Under Article 19, both dated February 13, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PR 17-060 RESOLUTION OF DECISION

APPEARANCES

Azam & Hertz, LLP, Jackson Heights (*Khalid M. Azam* and *Afzaal M. Sipra* of counsel), for petitioner.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Benjamin T. Garry* of counsel), for respondent.

WITNESSES

Mohammad Afzal, Jusue Otoniel Vasquez Moreno, Rizwan Ullah Khan, for petitioner.

Senior Labor Standards Investigator Wei Sha, for respondent.

WHEREAS:

Petitioner Mohammad Afzal (hereinafter "Afzal") filed a petition with the Industrial Board of Appeals (hereinafter "Board") in this matter on April 11, 2017, pursuant to Labor Law § 101, seeking review of two orders issued against him by respondent Commissioner of Labor on February 13, 2017. Respondent filed her answer to the petition on May 18, 2017.

Upon notice to the parties, a hearing was held on July 12, 2018 and November 1, 2018 in Garden City, New York, before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, to make statements relevant to the issues, and to file post-hearing briefs.

The order to comply with Article 19 of the Labor Law (hereinafter "minimum wage order") directs compliance with Article 19 and payment to respondent for unpaid wages to Rizwan Khan (hereinafter "Khan") in the amount of $32,750.86 for the time period from October 22, 2012 to October 9, 2015, and for unpaid wages to Josue Vasquez Moreno (hereinafter "Vasquez") in the amount of $46,652.19 for the time period from October 22, 2012 to October 9, 2015, for a total of $79,403.05 in unpaid wages; 16% interest calculated to the date of the order in the amount of $17,159.77; 100% liquidated damages in the amount of $79,403.05; and a 100% civil penalty of $79,403.05, for a total amount due of $255,368.92.

The order under Article 19 of the Labor Law (penalty order) imposes: (1) an $800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.6 by failing to keep and/or furnish true and accurate payroll records for each employee for the period October 22, 2012 through October 9, 2015; and (2) an $800.00 civil penalty for violating Labor Law § 661 and 12 NYCRR 142-2.7 by failing to furnish a wage statement to each employee with every payment of wages for the period October 22, 2012 through October 9, 2015, for a total amount due of $1,600.00.

The petition alleges that the orders are invalid and unreasonable because: (1) petitioner was not an employer, but himself an employee of Food & Discounts World Inc.; (2) the claimants were never underpaid; (3) Khan was a manager, who paid himself by check, in cash, and in checks in the name of his wife who never worked at the store; (4) claimant Vasquez only worked at the store for six months from January 2011 to June 2011, not during the relevant period; (5) Khan implicated Afzal because of a grudge and persuaded Vasquez to join his false claims; and, (6) the respondent did not properly investigate the claims. Petitioner also contested the civil penalties, interest, and liquidated damages in the orders.

Food & Discounts World Inc. (T/A Food and Discount World) was also named in the orders but as of the date of this decision, has not filed a petition with the Board and is not a party to this proceeding.

SUMMARY OF EVIDENCE

Testimony of Petitioner Mohammad Afzal

Petitioner Mohammed Afzal testified that during the relevant period, he was a part-time employee of two companies that successively operated a dollar store at the same Roosevelt, New York location: 99 Cent Wall from 2012 to approximately October or November 2013, and Food and Discounts World from October 2014 to October or December 2015. Afzal did not testify about what he did between October or November 2013 and October 2014. Afzal was hired by a woman he initially identified as Farida Sultan and later identified as Farida Sattar (hereinafter "Sattar"), to work at 99 Cent Wall where he worked until October or November 2013. In October or November 2013, Mohammad Younus (hereinafter "Younus") announced that he had become the store's owner, and the store's name was changed to Food and Discounts World. Neither Sattar nor Younus ever worked at the store. Afzal's wife, Sajiade Patel, also worked for Food and Discounts World for some months, but Afzal does not remember which months. Afzal worked at Food and Discount World until it closed in December 2015. According to Afzal, Mohammed Arif, the owner of a company called Big Discount Inc., "wanted to start a cell phone business [at Food & Discounts

World's former premises] because I have experience in cell phones" and Afzal began working there in March 2016 and was still doing so as of the July 12, 2018 hearing.

At each of the companies, Afzal was a sales person, stock person and cashier, and closed the store at night. Afzal testified that his work hours were 4:00 p.m. to 8:30 p.m. on weekdays and that he generally worked on Sunday. During the relevant period, the store was open on weekdays from 9:30 a.m. to 8:00 p.m., Saturdays 9:30 a.m. to 8:30 p.m., and Sunday from 10:00 a.m. to 6:00 p.m. During the month of Ramadan, the store closed at 6:00 p.m. each night. Employees were given a 45-minute lunch break from 1:00 p.m. to 1:45 p.m. each day except on Fridays when the store closed for prayers from 12:30 p.m. to 2:30 p.m.

In 2012, there were five employees: Afzal, Khan, Vasquez, and two employees identified only by their first names, Zubida and Shakira. Vasquez worked from 12:00 p.m. or 1:00 p.m. until 6:00 p.m., leaving after taking out the garbage and cleaning up. When asked what days Vasquez worked, Afzal replied that he would be there "sometimes." Afzal testified that Vasquez stopped working in May 2012 and Afzal never saw him again until the hearing in this matter. Afzal also testified that someone with a name sounding like "Edgar" started work around June 2012.

Afzal testified that Khan was the manager and did all the ordering for the store, had authority to pay the gas and electric bills, signed checks to wholesalers and signed invoices for deliveries. Khan worked from 9:30 a.m. to 4:00 p.m. or 4:30 p.m. Monday to Friday, and Afzal would relieve Khan at 4:00 p.m. At various points Afzal testified that Khan also worked from 9:30 a.m. to 4:00 p.m. on Saturday; that he "sometimes" did so; that Saturday and Sunday were Khan's days off; and that if Afzal himself needed time off on a Sunday (when he normally worked alone with Shakira and another cashier named Gladys), he would switch work days with Khan. According to Afzal, he never hired anyone, did not have the authority to hire or fire anyone, and was given instructions by Khan.

Afzal testified that Khan told him on one occasion that he was paid in cash as well as checks, and that he was paid $800.00 per week in 2012 and 2013. Khan never discussed his wages with Afzal after that. Afzal stated that he knew, however, that Younus raised Khan's pay to $900.00 per week in November 2013.

Afzal testified that after the Department of Labor requested payroll records during the investigation, he obtained permission from the present owner of the store to open a file cabinet to look for records left behind by the previous owners. According to Afzal "some were missing. The payroll ledger had gone missing." Afzal found copies of some checks issued by 99C Wall Inc. to Khan's wife, Mehwish Rizwan (hereinafter "Rizwan"), "that were left…in a file below. These are documents that had spilled or fell under the drawers." The checks that Afzal found in the store were not offered into evidence by petitioner but other checks received through subpoenas issued to banks were offered into evidence, as discussed below.

Afzal testified that Khan was paid $500.00 in cash per week, and the remainder by check when Khan worked six days or there was overtime. At another point, Afzal testified that Khan "used to get $400.00 cash every week continuously." Afzal testified that he has seen checks made out to Khan's wife in the amount of "800 or 900 – 900 about once a week, weekly. Normally more than 900."

Afzal testified that he relieved Khan at 4:00 p.m. and there was no way that Khan would stay and work in the store after 4:00 p.m.; that the store closed at 8:00 p.m. and never closed at 8:30 p.m.; that on Fridays the store was closed for prayers for two hours from 12:30 p.m. to 2:30 p.m., and it took 15 minutes each way to travel to the mosque; that Khan only occasionally worked on Sundays; and that Vasquez did not work after October 2012 or May 2012.

Testimony of Claimant Jusue Otoniel Vasquez Moreno

Vasquez testified he began working for Afzal when Afzal opened the dollar store and worked there for four or five years. Vasquez does not remember what year he began working for Afzal. Vasquez found out about the job when Khan, recruiting people to help stock the new store, came to another store where Vasquez was working. Vasquez did not know Khan at that time but told him he was interested. The next day, Vasquez went to the store where Afzal interviewed him, hired him, and told him he would be paid in cash to work six days per week. The hours would be from 9:30 a.m. to 8:30 p.m. on Mondays through Saturdays and from 10:00 a.m. to 7:00 p.m. on Sundays, with one day off per week. Vasquez usually had Tuesdays off but sometimes instead of Tuesday, he would have a Sunday or a Monday off. Afzal told Vasquez he "was the owner and the one that paid and did everything," and gave Vasquez his first cash payment.

Vasquez worked from 9:30 a.m. to 8:30 p.m. six days a week with Tuesdays off, except that on Sundays the store normally closed at 7:00 p.m. and on Fridays it was closed for prayers from 1:00 p.m. to 2:00 p.m. He had a 30-minute lunch break. The store was open 365 days per year, and he worked almost all holidays because holidays were the store's busiest time. For example, Vasquez worked Christmas Day 2012 from 9:30 a.m. to 8:30 p.m. Vasquez was paid $425.00 per week in cash for about three years, and in 2015 received a five-dollar raise to $430.00 per week. Other store employees included Khan, Shakira, Edwin, who left to go to El Salvador, and female cashiers including Fatima, Jackie and Suzilla. Afzal changed the name of the store "a lot of times" during the time that Vasquez worked for Afzal, but Vasquez does not remember the names of the store. He believes Afzal continued to be the owner throughout the time he worked there. Vasquez quit working at the store; he thinks this occurred two weeks before Khan was fired.

Vasquez testified that he signed an English-language Minimum Wage/Overtime Complaint at the DOL after Khan's wife Mehwish wrote in answers and a Spanish-speaking DOL employee read and explained them. The complaint states that Vasquez was hired in 2009 and was fired on October 9, 2015; that his hours were Monday through Thursday from 9:30 a.m. to 8:00 p.m., Friday and Saturday from 9:30 a.m. to 8:30 p.m. and Sunday from 10:00 a.m. to 7:00 p.m.; that he received a 30-minute lunch break each day; and that he was paid a salary of $400.00 per week.

Vasquez testified that during the relevant period he was in a bicycle accident and was hospitalized for a week. He had physical therapy three times per week in the morning at 9:00 a.m. for two months, walking about a mile from his home to the physical therapist. Vasquez did not remember the dates of his accident or hospitalization but stated at the July 12, 2018 hearing that he would try to furnish the accident report and hospital paperwork which would establish them at the next hearing date. Vasquez did not appear at the November 1, 2018 hearing.[1] Neither party requested any relief because of Vasquez's non-appearance on the second day of hearing.

[1] The hearing was originally scheduled for two consecutive days, July 12 and 13, 2018, but was adjourned at Afzal's request.

Testimony of Claimant Rizwan Ullah Khan

Afzal hired Khan to work at the store in 2009 or 2010 prior to its grand opening. At that time, the store was called 99 Cent Emporium. The store's name later changed four or five times, first to 99 Cent 4 All, then to 99 Cent 4 All at Roosevelt, then to 99 Cent and More and finally to Food & Discounts World. Kahn testified that Younus, who was Afzal's brother-in-law, was also an owner of Food and Discounts World. Younus did not work at the store.

For his first two or three years of employment, Khan worked seven days a week: Monday through Thursday from 9:30 a.m. to 8:00 p.m., Friday and Saturday 9:30 a.m. to 8:30 or sometimes 9:00 p.m., and Sunday from 10:00 a.m. to 7:00 p.m. During the relevant period, his hours were the same except that he usually had Sundays off. On Fridays, the store closed from 1:00 p.m. to 2:00 p.m. for prayer. The store hours remained unchanged during the month of Ramadan. Khan was paid $500.00 per week during the relevant period, regardless of whether he worked seven days or six days. If he took a day off, it would be deducted from his pay. Khan did not take any holidays. During the two Eid holidays, Khan would pray first and then open the store half an hour late, and the store remained open for the rest of the day.

Khan was usually paid his $500.00 weekly salary in cash. When funds were not available, he was given a check and was asked to delay depositing it, "or sometimes they would give me a check with two weeks of wages." According to Khan, this happened once in a while, which is why Khan's complaint stated that he was paid in cash, without mentioning checks. Khan's paychecks were made out to his wife, Mehwish Rizwan, because for two or three years he did not have a bank account.

In 2012 and 2013, Khan was given both a W-2 form and a 1099 form from 99 Wall, Inc. His wife also received a W-2 form from 99 Wall, Inc. in 2013 because she worked at the store during that year. In 2014 and 2015, Khan was given one W-2 form which listed both Food and Discounts World, Inc. and an entirely different employer, 99 C and More, as the employers. Khan testified that Afzal gave him the W-2 forms.

Khan testified that although his salary was $500.00 per week each year, at each year's end he received W-2s or 1099 forms indicating that he earned far less than he was actually paid.

Khan testified that Afzal paid him, told him his duties when he started work, gave him W-2 and 1099 forms, gave him permission to take time off when necessary, and gave him a Christmas bonus each year. Asked if anyone kept track of his time, Khan answered that Afzal knew when he came to work. In 2009 and 2010 Afzal kept a book to acknowledge receipt of weekly wages which Khan signed when he received his pay, but after 2010, Afzal no longer asked Khan to sign that book. Khan's duties during the relevant period included "everything. I used to check the deliveries. I used to check the cell phone bills at the cell phone counter. I would do security work also, cash work."

Khan testified that Afzal took him to the Long Island Power Authority and National Grid and asked him to sign documents indicating that he was responsible for the accounts for Food & Discounts World if Younus was not available, which he did.

Khan initially testified that he, Vasquez and Shakira were all fired the same day, then that "[E]veryone left together," and then that "[w]hen we left, … Shakira said, if you are leaving, then I will also leave…. When I was discharged, Shakira said, I'm not going to work either." The Minimum Wage/Overtime Complaint form Khan filed with the Department of Labor on October 19, 2015 states that he was fired on October 9, 2015. Neither Khan's testimony nor the form stated who fired Khan or why. Khan testified that the form he filed with the Department of Labor was filled in by his wife, Mehwish Rizwan, and Khan read it before signing.

Khan testified that he signed a letter stating that he was withdrawing his wage claim against Afzal because he could no longer afford to pay the lawyer that he hired to represent him in a subpoena enforcement action commenced by Afzal in New York State Supreme Court, Nassau County. He testified that he did still want to pursue his wage claim.

Testimony of Senior Labor Standards Investigator Wei Sha

Senior Labor Standards Investigator Wei Sha supervised the investigation in this matter, which was conducted by Labor Standards Investigator Dawn Hughes. Hughes visited the store on March 18, 2016 and requested proof of hours worked, wages paid, cancelled checks, W-2's for 2013, 2014 and 2015, and a list of all employees' names and addresses. Afzal did not provide any documents in response to Hughes's document request. Sha testified that in the absence of accurate and complete time and payroll records, the Department of Labor relies upon the employees' claims to determine the employer's liability. Sha stated that she arrived at the 100% civil penalty in the minimum wage order by taking into consideration the good faith of the employer and the gravity of the violations, including that the petitioner failed to pay employees overtime or maintain payroll records. Sha testified that 100% percent liquidated damages were also assessed against Afzal based on his bad faith in failing to pay overtime. Sha testified that no documentary evidence was provided during the investigation to prove either that Afzal was not an employer or that the claimants had been paid. Checks to Mehwish Rizwan were not provided during the investigation.

Petitioner's Documentary Evidence

Petitioner entered cancelled checks into the record from HAB Bank and Bank of America, made out to Mehwish Rizwan. There were no checks made out to Khan or Moreno. The following checks dated through October 2013 were from a Bank of America account, the payor was 99 Cents Wall Inc., and had a signature that is indecipherable:

Date of Check	**Amount**
5/13/13	$ 500.00
5/19/13	$ 250.00
5/26/13	$ 817.00
6/10/13	$ 250.00
6/18/13	$ 250.00
6/24/13	$ 250.00
6/30/13	$ 250.00
7/7/13	$ 300.00
7/23/13	$ 300.00
7/31/13	$ 300.00
8/6/13	$ 300.00

8/11/13	$ 300.00
10/13/13	$ 417.00
10/21/13	$ 217.00
Total	**$4,701.00**

There was no testimony to identify which of these checks were to pay Khan for wages and which of these checks were to pay Mehwish Rizwan, who Khan testified worked there in 2013.

The following subsequent checks were from an HAB account, made out to Mehwish Rizwan, the payor was Food & Discounts World Inc., and the signature was indecipherable:[2]

Date of Check	**Amount**
4/21/14	$ 500.00
7/21/14	$ 933.00
8/5/14	$ 933.00
8/19/14	$ 500.00
8/26/14	$ 500.00
9/8/14	$ 450.00
9/15/14	$ 500.00
9/23/14	$ 433.00
10/5/14	$ 500.00
10/16/14	$ 733.00
10/21/14	$ 400.00
11/12/14	$ 600.00
11/18/14	$ 400.00
Total	**$7,382.00**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rules of Procedure and Practice (hereinafter "Board Rules) (12 NYCRR) § 65.39.

Standard of Review and Burden of Proof

Petitioner's burden of proof in this matter was to establish by a preponderance of the evidence that the orders issued by the Commissioner are invalid or unreasonable (State Administrative Procedure Act § 306; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 66.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of RAM Hotels, Inc.*, Docket No. PR 08-078, at p. 24 [Oct. 11, 2011]). A petition must state "in what respects 'the order on review' is claimed to be invalid or unreasonable," and any objections not raised shall be deemed waived (Labor Law § 101 [2]). The Labor Law provides that an order of the commissioner shall be presumed valid (*id.*

[2] No witness, including Khan and Afzal, was asked to identify the signatures on checks. Petitioner's brief asserts that they read "Fareeda" and "M Younus."

§ 103 [1]). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]). For the reasons discussed below, we affirm the order as modified below.

Petitioners do not meet their burden through indirect means by attacking the Commissioner's investigation (*see Matter of Mohammed Aldeen and Island Farm Meat Corp. (T/A Al-Noor Live Poultry)*, Docket No. PR 07-093, at pp. 12-15 [May 20, 2009] citing *Angello v National Fin. Corp.*, 1 AD3d at 820-821 [3rd Dept 2003] [assertion that Commissioner's order was not based on "credible proof" does not shift burden from employer with inadequate records and in the absence of contemporaneous payroll records, it was petitioners' burden to submit sufficient affirmative evidence to negate the Commissioner's determination of wages owed, not just general and unreliable recollection]). Additionally, the Board has previously held that due process is satisfied by the opportunity to contest orders at a hearing before the Board (*Matter of Clifton J. Morello (T/A Iron Horse Beverage LLC)*, Docket No. PR 14-283, at p. 6 [Sept. 14, 2016]; *Matter of Angelo A. Gambino and Francesco A. Gambino (T/A Gambino Meat Market, Inc.)*, Docket No. PR 10-150, at p. 6 [July 25, 2013]).

The Petitioner Was the Claimants' Employer

We find that Afzal is individually liable as an employer under Article 19 of the Labor Law. "Employer" as defined in Labor Law Article 19 means "any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as an employer" (Labor Law § 651 [6]); *see also* Labor Law § 2 [6]). "Employed" means "permitted or suffered to work" (Labor Law § 2 [7]). Like the New York Labor Law, the federal Fair Labor Standards Act (hereinafter ("FLSA") defines "employ" to include "suffer or permit to work" (29 USC 203 [g]), and the test historically used for determining whether an entity or person is an "employer" under the New York Labor Law is the same test for analyzing employer status under FLSA (*Bonito v Avalon Partners, In.*, 106 AD3d 625, 635 [1st Dept 2013]; *Matter of Maria Lasso and Jaime M. Correa Sr. and Exceed Contracting Corp.*, Docket No. PR 10-182, at pp. 6-7 [Apr. 29, 2013], *affd sub nom. Matter of Exceed Contracting Corp. v Indus. Bd. of Appeals*, 126 AD3d 575, 576 [1st Dept 2015); *see also Matter of Netram v New York State Industrial Board of Appeals*, 162 AD3d 1362 [3d Dept 2018]; *Chung v New Silver Palace Rest., Inc.*, 272 FSupp 2d 314, 319 n 6 [SDNY 2003]). Pursuant to Labor Law § 2 (6), the term "employer" is not limited to the owners or proprietors of a business, but also includes any agents, managers, supervisors or subordinates (*Matter of Tatiana and Sarantis Ballakis and Carpio Organization, Inc.*, Docket Nos. PR 15-334 and 15-335, at p. 7 [September 14, 2016] [assertion that petitioner's wife, not petitioner, owned the business is not dispositive with respect to his status as an employer under the Labor Law]; *Matter of Petula Gianopoulos Sikiotis*, Docket No. PR 11-186, at p. 6 [September 24, 2014]; *Matter of Frank Bova & APP (AL) Joseph*, Docket No. PR 06-024, at p. 4 [November 28, 2007]). Under the broad New York and FLSA definitions of "employer," more than one person or entity can be found to be an employee's employer (*Matter of Zurita v New York State Dept. of Labor*, 175 AD3d 1182 [1st Dept 2019]; *Zheng v Liberty Apparel Co.*, 355 F3d 61 [2d Cir 2003]; *Matter of Petula Gianopoulos Sikiotis,* Docket No. PR 11-186 [September 24, 2014]; *Matter of Franbilt, Inc.,* Docket No. PR 07-019 [July 30, 2008]).

In *Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 (2d Cir 1999), citing *Carter v Dutchess Comm. College*, 735 F2d 8, 12 (2d Cir 1984) and *Goldberg v Whitaker House Coop*, 366 US 28, 33 (1961), the Second Circuit explained the "economic reality test" used for determining employer status:

> "[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question with an eye to the 'economic reality' presented by the facts of each case. Under the 'economic reality' test, the relevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records" (internal quotations and citations omitted).

No one of these factors is dispositive; the purpose of examining them is to determine economic reality based on a "totality of circumstances" (*id.*)

Respondent determined that Afzal was claimants' employer based on their statements that Afzal hired them, paid their wages, set their hours, and supervised their work. Afzal's burden was to prove at the hearing that he was not, as a matter of economic reality, the claimants' employer (State Administrative Procedure Act § 306; Labor Law §§ 101, 103; Board Rules [12 NYCRR] § 66.30; *Matter of Garcia v Heady*, 46 AD3d 1088, 1090 [3d Dept 2007]; *Matter of Angello v National Fin. Corp.*, 1 AD3d 850, 854 [3d Dept 2003]; *Matter of Jocelyne Wildenstein,* Docket No. PR 15-269, at p.5 [October 26, 2016]). Based on the evidence in the record, we find it was reasonable and valid for respondent to determine that petitioner was the claimants' employer during the relevant period because Afzal "possessed the power to control" both claimants during the relevant period, even if he was not the actual owner of the subject store *(Herman,* 172 F3d at 139).

The credible evidence demonstrates that Afzal satisfied all four of the factors mentioned in *Herman* as evidence of employer status. Vasquez testified that Afzal interviewed and hired him and set his work schedule and rate and method of payment. Khan testified that Afzal hired him and told him his duties and identified Afzal as the person who gave him 1099 and W-2 forms, gave him permission to take time off when necessary, and gave him a Christmas bonus. Khan testified that Afzal kept track of his hours, and prior to the relevant period, maintained a book in which employees acknowledged receipt of their weekly wages. Khan testified that Younus, identified by Afzal as the individual employer as well as Food & Discounts World's owner, was Afzal's brother-in-law and did not work in the store. Afzal did not credibly rebut Vasquez or Khan's testimony about the *Herman* factors, confirmed the absence of Sattar and Younus, who he identified as successive absentee owners, and provided no credible testimony or corroborating witnesses to prove who was in charge on a day to day basis in Sattar's and Younus's absence.

With regard to the fourth *Herman* factor, maintenance of records, Afzal claimed he was merely an employee whose duties were customer service, cashiering, and stocking. Yet Afzal testified that he knew where personnel and banking records were maintained, that a payroll register existed, and that the payroll register was missing from the files. We do not find Afzal's testimony credible that while working for a subsequent employer, he looked under file cabinet drawers and found checks pertaining to Khan but did not find the payroll register. In the ordinary course of business, an employee with Afzal's professed duties as a salesperson, stock person and cashier, would not be privy to an employer's banking and personnel records. A mere employee would not know where and which documents, particularly a payroll register and checks, were retained. The fact that Afzal specifically knew of the existence and location of Food and Discount World's payroll register, particularly since he provided no evidence of anyone else who did during the

relevant period, makes it reasonable to infer that he participated in maintaining those records.

Afzal claimed he was merely an employee whose own work schedule did not start until 4:00 p.m. but testified that Vasquez arrived at work "sometimes it'll be 12 o'clock, 1 o'clock" and Khan started at 9:30 a.m., including on Saturdays when Afzal was off. All of this occurred at times when Afzal testified that he was not working. We do not find it credible that Afzal was only an employee but so familiar with the actual work times of employees that occurred outside of his own work schedule.

The petition alleged that Khan was a manager. Afzal, however, provided no evidence that Khan had any authority over payroll or that he signed payroll checks to himself or anyone else. Afzal, on the other hand, testified that he knew what Khan was paid, including how much he was paid in cash, by check and through checks to Khan's wife Mehwish Rizwan. We find it implausible that Afzal gleaned such information from what he testified was one conversation in which Khan told him that he was paid in cash as well as checks, or by getting permission from the owner of Big Discounts Inc., the new occupant of what had been the dollar store, to look for stray checks that had fallen under cabinet drawers. Afzal's account of the amount and method of payment to Khan are difficult to square with his claim that he was just another employee and did not control other employees' rates and methods of payment.

Afzal provided vague and general testimony that he was only an employee during the period of the claim and had no control over the claimants, that Sattar and Younus were successively the store's owners, and that Khan was the manager. Without corroborating evidence, and in the face of the two claimants' credible contrary testimony, we find Afzal's testimony insufficient to meet his burden of proof. Afzal did not call any witnesses, including Younus (who Afzal did not dispute was a relative) or Sattar, to corroborate his testimony. Afzal's argument that he did not own the store and cannot be held liable as an employer along with the corporate entities is unpersuasive and does not relieve him of individual liability, as a worker can have more than one employer (*Ansoumana v Gristede's Operating Corp.*, 255 F Supp 2d 184, 189 [SDNY 2003]). Afzal need not have any ownership interest in the place of employment to be held individually liable as an employer (Labor Law § 651 [6]; *see Matter of Frank Bova & APP (Al) Joseph*, Docket No. PR 06-024, at p. 4). We affirm the order's finding that Afzal was the claimants' employer within the meaning of the Labor Law.

Petitioner Failed to Maintain Required Records and the Penalty Order Is Affirmed

Article 19 of the Labor Law requires employers to maintain, for six years, certain records of the hours their employees worked and the wages they paid them (Labor Law § 661). The records must show for each employee, among other things: the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a spread of hours exceeding 10; each employee's regular and overtime hourly wage rate; gross wages; deductions from gross wages; allowances or meal credits claimed; and net wages paid (*id.*; Department of Labor regulations [12 NYCRR] § 142-2.1[a]). Employers must keep such records open for inspection by the Commissioner or a designated representative or face issuance of a penalty (Labor Law §§ 661 and 662 [2]). Department of Labor regulations (12 NYCRR) § 142-2.7 requires that employees when paid be furnished a statement listing hours worked, rates paid, gross wages, credits claimed for meals, and net wages. Such required record-keeping provides proof to the employer, the employee and the Commissioner that employees were properly paid.

It is undisputed that petitioner failed to maintain legally required payroll records or provide employees with wage statements throughout the relevant time period. As such, the Commissioner's imposition of an $800.00 civil penalty for petitioner's violation of Labor Law § 661 and Department of Labor regulations (12 NYCRR) § 142-2.6 for failing to keep and/or furnish true and accurate payroll records for each employee for the period October 22, 2012 through October 9, 2015; and an $800.00 civil penalty for violating Labor Law § 661 and Department of Labor regulations (12 NYCRR) § 142-2.7 for failing to furnish a wage statement to each employee with every payment of wages for the period October 22, 2012 through October 9, 2015, for a total amount due of $1,600.00 was reasonable and valid, and we affirm the penalty order.

The Minimum Wage Order is Affirmed as Modified

Article 19 of the Labor Law, entitled the "Minimum Wage Act," sets forth the minimum wage that every employer must pay each of its non-exempt employees for each hour of work (Labor Law § 652 [1]). Article 19 also requires payment of time and one-half the regular wage rate for hours worked over 40 in a work week (Department of Labor regulations [12 NYCRR] §§ 142-2.2 and 142-3.2). When an employee is paid on a salary or on any basis other than an hourly rate, the regular hourly wage rate shall be derived by dividing the total hours worked during the week into the employee's total earnings (*see* Department of Labor regulations [12 NYCRR] § 142-2.16). Employees are entitled to an additional hour's pay at the basic minimum hourly wage rate for any day in which the "spread of hours" – the interval between the beginning and end of an employee's work day – exceeds 10 hours, including working time plus time off for meals and intervals off duty (*see* Department of Labor regulations [12 NYCRR] §§ 142-2.4 and 142-2.18).

Labor Law § 196-a provides that when an employer fails to keep adequate records, the employer bears the burden of proving that wages were paid. As the Appellate Division stated in *Matter of Mid Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 (3d Dept 1989), "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer" (*see Matter of Bae v IBA,* 104 AD3d 571 [1st Dept 2013]; *Matter of Ramirez v Commissioner,* 110 AD3d 901 [2d Dept 2013]; *Matter of Mohammed Aldeen,* Docket No. PR 07-093 [May 20, 2009], *affd sub nom Matter of Aldeen v Industrial Appeals Bd.,* 82 AD3d 1220 [2d Dept 2011]; *Matter of Garcia v Heady,* 46 AD3d 1088 [3d Dept 2007]).

Therefore, the petitioner had the burden of showing that the Commissioner's order is invalid or unreasonable by a preponderance of the evidence of the specific hours that claimants worked and that they were paid for those hours, or other evidence that shows the Commissioner's findings to be unreasonable (*Matter of RAM Hotels, Inc.,* Docket No. PR 08-078). When incomplete or unreliable wage and hour records are provided, DOL is "entitle[d] to make just and reasonable inferences and use other evidence to establish the amount of underpayments, even though the results may be approximate" (*Matter of Hy-Tech Coatings v New York State Dept. of Labor,* 226 AD2d 378, 379 [1st Dept 1996]. The employer "cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records" as required (*Anderson v Mt Clemens Pottery Co.*, 328 US 680, 688-689 [1949]; *see also Matter of Mohammed Aldeen et al*, Docket No. PR 07-093 [May 20, 2009], *affd sub nom Matter of Aldeen v IBA*, 82 AD3d 1220 [2d Dept 2011]; *Mid Hudson Pam Corp.*, 156 AD2d at 821). Even if DOL estimates based on employee claims are imprecise, "reasonable estimates are allowed since

it is the employer's burden to maintain accurate records" (*Matter of Karl Geiger and Geiger Roofing Co.*, Docket No. PR 10-303, at p. 8 [Jan. 16, 2014], *affd sub nom. Matter of Geiger v DOL*, 131 AD3d 887 [1st Dept 2015]).

Here, the petition alleged that Vasquez worked "for around six months from January 2011 to June 2011" and Afzal testified that Vasquez did not work after either May 2012 or October 2012 but provided no corroborating witnesses or documentary evidence for either of those three different assertions. Afzal also did not specify how many days per week Vasquez worked or how much he was paid on a daily or weekly basis, testifying only that Vasquez arrived sometimes at 12:00 p.m. and sometimes at 1:00 p.m. and worked until 6:00 p.m. Vasquez' testimony about when and how long he worked was detailed, corroborated by Khan, and included detail about other employees, some of whom Afzal also named in his testimony, who worked at the store during the relevant period after petitioner claims Vasquez was no longer working.

Afzal testified that Khan was paid $500.00 in cash per week, and the remainder by check when Khan worked six days or there was overtime. At another point, he claimed it was "$400.00 cash every week continuously" and that he saw checks made out to Khan's wife in the amount of "800 or 900 – 900 about once a week, weekly. Normally more than 900." We credit Khan's testimony that he was paid his $500.00 per week salary mostly in cash and was paid by checks (made out to his wife because he did not have a bank account) on occasion when cash funds were unavailable, "or sometimes they would give me a check with two weeks of wages." The pattern of occasional checks made out to Mehwish Rizwan in the record is consistent with this testimony.

We find that the petitioner failed to meet his burden of proving by a preponderance of the evidence the specific hours worked by the claimants or that they were paid for those hours. Because petitioners produced no credible records, DOL properly based its determination of wages due on employee statements, which was the best available evidence. Based on the evidence presented at the hearing, we find that respondent's determination of wages owed is reasonable and valid, except as modified below.

DOL based its underpayment calculation for Khan and Vasquez on their complaint forms, which showed both claimants working a total of 69.5 hours not including a 30-minute daily lunch break in a seven-day week including six days in which the "spread of hours" (the interval between the beginning and end of the employee's work day) exceeded 10 hours.[3] Based on both claimants' testimony that the store closed for an hour each Friday for prayers, 60 rather than 30 minutes must be deducted from work time on Fridays, reducing their weekly work time from 69.5 to 69 hours. In addition, Khan testified that although prior to the relevant period he worked seven days per week, during the relevant period he mostly had Sundays off. Since the complaint forms showed and Khan testified that he worked from 10:00 a.m. to 7:00 p.m. on Sunday with a 30-minute lunch break (8.5 work hours), we find that he worked 60.5 hours per week during the relevant period. Since Vasquez testified that he was usually off on Tuesdays, when the complaint forms showed he worked from 9:30 a.m. to 8:00 p.m. with a 30-minute lunch break (ten hours), we find that he worked 59 hours per week during the relevant period and was entitled to five rather than six days' "spread of hours" pay per week.

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[3] Apparently simply through mistake, the original calculation for Vasquez was based on 68.5 hours per week even though his complaint, like Khan's, reflected 69.5 work hours.

For the first 62 weeks of the relevant period, from the week ending October 28, 2012 until the week ending December 29, 2013, the minimum wage established by Labor Law § 652 [1] was $7.25 per hour, during 2014 it was $8.00, and for the 40 weeks in 2015 prior to October 9, 2015 when Khan testified his employment at the store ended, it was $8.50 per hour. Based on the work hours found above and what we find was his $500.00 per week salary, the following table shows Khan's underpayment:

Weeks	Minimum hourly wage	Derived hourly rate ($500 divided by 60.5 hours worked)	Weekly wages earned (including overtime) based on derived hourly rate (or if higher, statutory minimum wage)	Spread of hours pay for 6 days	Weekly underpayment (wages earned including "spread" pay, less $500)	Underpayment for entire period
62 10/28/12 - 12/31/13	$7.25	$8.26	$584.71	$43.50	$128.21	$7,949.07
52 1/1/14 - 12/31/14	$8.00	$8.26	$584.71	$48.00	$132.71	$6,900.96
40 1/1/15 - 10/9/15	$8.50	$8.26	$601.38	$51.00	$152.38	$6,095.00
					TOTAL	**$20,945.02**

Similarly, the following table shows Vasquez's underpayment in each of those periods. Vasquez testified that he was paid $425.00 per week until 2015 when his pay was raised to $430.00 per week, so his derived hourly rate ($425.00 or $430.00 divided by 59 weekly hours worked) of $7.20 or in 2015 $7.29, was always less than the minimum wage required by Labor Law § 652 [1]. Accordingly, the required pay for him was always based on the minimum wage, not his derived rate. Because Vasquez testified that he quit about two weeks before Khan's firing, the table shows 38 rather than 40 work weeks in 2015.

Weeks	Minimum hourly wage	Weekly wages earned (including overtime) based on statutory minimum wage	Spread of hours pay for 5 days	Weekly underpayment (wages earned including spread pay, less $425 or $430)	Underpayment for entire period
62 10/28/12 - 12/31/13	$7.25	$496.63	$36.25	$107.88	$6,688.25
52 1/1/14 - 12/31/14	$8.00	$548.00	$40.00	$163.00	$8,476.00
38 1/1/15 - 9/25/15	$8.50	$582.25	$42.50	$194.75	$7,400.00
				TOTAL	**$22,564.75**

Based on the testimony at the hearing, a further adjustment to the calculation for Vasquez must be made. Vasquez testified that he was injured in a bicycle accident and was hospitalized for one week and underwent outpatient physical therapy for eight weeks. The testimony was

corroborated by Khan, who testified that Vasquez was out of work for a short period of time after the bicycle accident. We find that nine weeks when he did not work must accordingly be omitted from the underpayment calculation for Vasquez. Vasquez did not clarify the date of the accident from his records, although he stated at the first hearing day that he would at the next day of the hearing, when he failed to appear. We deduct nine weeks of underpayment at $194.75 per week, which reduces his underpayment amount to $20,812.00.

Finally, we decline to modify the underpayment finding with respect to Khan based on Petitioner's contention that payments made to Khan's wife, Mehwish Rizwan, should be credited against the underpayment. We find that based on the record evidence, checks made out to Mehwish Rizwan were intended as payment to Khan.[4] Khan testified that when the employer was short on cash he was paid by check, made out to his wife because Khan did not have a bank account, including checks to make up for periods when the employer had fallen behind.[5] When making its underpayment calculation, the Department of Labor assumed Khan was paid $500.00 per week in cash (as the complaint he filed with respondent stated) rather than partly in checks made out to Mehwish Rizwan. Whether Khan's compensation was paid entirely in cash or in part in checks made out to his wife does not affect the significant finding that his salary was $500.00 per week. The checks made out to Mehwish Rizwan (totaling $4,701.00 in 2013 and $7,382.00 in 2014) were far less than the overall salary ($26,000.00 in each year) that respondent assumed was paid to Khan when making its overtime underpayment calculation. We find no reason to modify that calculation based on the evidence concerning Mehwish Rizwan, particularly in the absence of legally required payroll records which would indicate, *inter alia,* who was employed, the daily and weekly hours worked, and wages paid.

Khan is Not A Party in this Case; Only Respondent Can Elect Not to Seek Wages in an Order.

Petitioner's principal challenge to the minimum wage order with respect to Khan rests on an alleged settlement and release executed by Khan during subpoena enforcement proceedings that petitioner commenced in state Supreme Court to enforce subpoenas issued by the Board at petitioner's request, Khan testified that he signed a letter stating that he wants to withdraw his wage claim that he filed with the Department of Labor because "[t]hey took me to court. I could not afford a lawyer. Whenever I go to court with a lawyer, I have to pay 500.00 dollars. My wife told me to withdraw the case because we could not afford it.... [B]ut then I changed my mind" because he was told he would be provided with a Department of Labor lawyer free of charge in his case before the Industrial Board of Appeals. Petitioner also offered a stipulation of settlement from the subpoena enforcement action in which Khan withdrew his wage claim against petitioner, however that stipulation was only signed by Khan and his attorney and the copy in evidence for this matter was not countersigned by petitioner or petitioner's attorney. Thus, we reject petitioner's claim that these documents require us to revoke the portion of the order relating to Khan's wages. The Board has held that a claimant, such as Khan, is not a party to a Board proceeding; the parties are the Department of Labor and the petitioner, and a claimant cannot withdraw a claim unless the Department of Labor is a party to the withdrawal agreement (*Matter of Roberto Guendjian and Grilled Steak Corp.*, Docket No. PR 15-313 [July 26, 2017], *appeal dismissed Matter of Guendjian*

[4] No evidence to support the petition's claim that Khan made the payments himself was furnished.

[5] While Khan also testified that if his wife was issued a W-2, then she worked at the store, and evidence shows that Mehwish Rizwan was issued a W-2 in 2013, both Afzal and Vasquez testified that Mehwish Rizwan never worked at the store. We find no basis to conclude that any payments shown in the record were to compensate Mehwish Rizwan for her work rather than Khan for his.

v Reardon, 170 AD3d 1288 [3d Dept 2019]). The U.S. Supreme Court confronted a claim like petitioner's that a contract between an employer and an employee also bound the Equal Employment Opportunity Commission, to which the employee had complained. The Court found: "It goes without saying that a contract cannot bind a nonparty" (*EEOC v Waffle House, Inc.*, 534 US 279, 294 [2002]). Similarly, the New York Court of Appeals held in *People v Coventry First LLC*, 13 NY3d 108, 114 [2009] that "[l]ike the EEOC, the [New York] Attorney General should not be limited, in his duty to protect the public interest, by an arbitration agreement he did not join. Such an arrangement between private parties cannot alter the Attorney General's statutory role or the remedies that he is empowered to seek."

Not only was Khan's agreement to withdraw his wage claim not one to which respondent was a party or capable of binding respondent, but petitioner's contrary argument is egregious in the circumstances here. As already stated, Khan is not and never was a party in this proceeding, where he was subpoenaed at petitioner's request not as a party but as a witness. Conversely, respondent was not a party to the subpoena enforcement proceeding petitioner brought against Khan and his wife[6] in state Supreme Court, much less to any agreement Khan made to settle that litigation. Khan credibly testified that after he retained counsel to defend him and his wife in the state court proceeding, he eventually agreed to settle it by stating that he was withdrawing his wage claim because he could not afford to continue paying his lawyer for appearances. Petitioner's argument that the order should be vacated because Khan agreed to withdraw his complaint to the respondent to avoid recurring legal fees is rejected.

The Civil Penalty Assessed in the Minimum Wage Order is Affirmed

The minimum wage order assessed a civil penalty in the amount of 100% of the wages due. Labor Law § 218 (1) provides that when determining the amount of civil penalty to assess against an employer who has violated a provision of Article 19 of the Labor Law, the Commissioner shall give:

> "due consideration to the size of the employer's business, the good faith basis of the employer to believe that its conduct was in compliance with the law, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with record-keeping or other non-wage requirements" (*id.*).

Sha testified that he assessed the 100% civil penalty by taking into consideration the good faith of the employer and the gravity of the violation, including that petitioners failed to pay the claimants overtime and did not maintain payroll records. The Board finds that the considerations and computations the Commissioner was required to make in connection with the imposition of the civil penalty amount set forth in the minimum wage order were valid and reasonable. The civil penalties in the minimum wage order, however, must be modified proportionally based on the modified wages due discussed above.

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[6] Although the caption of the Supreme Court, Nassau County litigation also includes "Josue Moreno" as a listed respondent, petitioner offered no evidence that Vasquez appeared in the case nor evidence that he was ordered or agreed to produce documents, withdraw his claim or take any other action.

Liquidated Damages Assessed in the Minimum Wage Order Are Affirmed

The minimum wage order assessed liquidated damages in the amount of 100% of the wages owed. Labor Law § 218[7] provides that when wages are found to be due, respondent shall assess against the employer the full amount of the underpayment or unpaid wages and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment or nonpayment of wages was in compliance with the law. Petitioner offered no evidence that he had a good faith basis to believe the underpayment was in compliance with the law. We therefore affirm the imposition of 100% liquidated damages in the minimum wage order. The liquidated damages in the minimum wage order must be modified proportionally based on the modified amount of wages due.

The Interest Assessed is Affirmed

Labor Law § 219 (1) provides that when the Commissioner determines that wages are due, the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of financial services pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment. Banking Law § 14-a sets the "maximum rate of interest" at "sixteen per centum per annum." The interest awarded in the order was in compliance with the statute.

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[7] While Labor Law § 218 requires the Commissioner to include 100 % liquidated damages in her orders to comply, Labor Law § 663 provides that liquidated damages shall be calculated by the Commissioner as "no more than" 100 % of the underpayments found due.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Respondent is directed to issue an amended minimum wage order based on our decision that Rizwan Khan is owed $20,945.02 and Jusue Otoniel Vasquez Moreno is owed $20,812.00, for a total of $41,757.02; the 100% civil penalty of must be recalculated to $41,757.02; 100% liquidated damages must be recalculated to $41,757.02; and interest must be recalculated on the amended principal amount; and

2. The penalty order is affirmed; and

3. The petition for review be, and the same is, otherwise denied.

Dated and signed by the Members
of the Industrial Board of Appeals
on January 29, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
New York, New York

Najah Farley, Member
New York, New York

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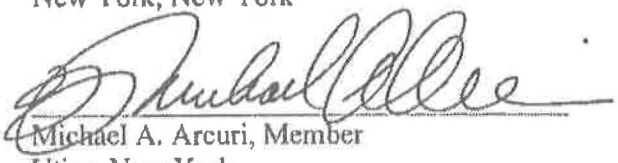

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